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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM DOCKET NO. 92-111
DEAS COMMUNICATIONS, INC.)	File No. BPH-910208MB
HEALDSBURG EMPIRE CORPORATION)	File No. BPH-910212MM
For Construction Permit for a)	
New FM Station on Channel 240A)	
in Healdsburg, California)	

To: The Review Board

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FILE

OPPOSITION TO APPEAL FROM DISMISSAL OF APPLICATION

Deas Communications, Inc. ("Deas"), by its attorneys, hereby opposes the "Appeal from Dismissal of Application" filed August 20, 1992 by Healdsburg Broadcasting, Inc. ("HBI")

1. HBI appeals from the ALJ's Memorandum Opinion and Order, FCC 92M-874, released August 13, 1992, dismissing its application for not complying with the Hearing Designation Order mandate that HBI file an acceptable engineering amendment within 30 days or be dismissed.¹ HDO, paras. 8-9, n. 5.

2. HBI admits its noncompliance and that its June 19, 1992 amendment violates Section 73.316(b)(2).² It argues

¹ The HDO states categorically, at para. 9, that if it "fails to cure [listed] defects, conflicts with a previously filed application, or for any other reason is unacceptable for filing, the amendment along with HBI's original application will be dismissed" (emphasis added.)

² This FM rule admonishes that directional antennas having "a radiation pattern which varies more than 2 dB per 10 degrees of azimuth will not be authorized."

HBI violated it twice: in a predesignation amendment of September 25, 1991 which was rejected in the HDO (para. 9 and n. 5); and in its June 1992 amendment. In each, HBI's "Horizontal Plane Relative Field Tabulation For Proposed Directional Antenna" (Ex. 3, p. 2) describes a pattern varying 2.145 dB between the 180 and 190-degree radials. Contrary to HBI's claim that this was a "typographical error," the Mass Media Bureau's own

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instead that this rule violation is de minimis, blames it on a consultant's "typographical error," insists that good cause was shown for a subsequent July 16 "Corrected Amendment," and asserts that its repeated violation (see n. 2) does not render the amendment unacceptable.³

3. HBI's logic is as flawed as its engineering. Its first three engineering showings were defective and the "Corrected Amendment" is the fourth try to get it right. The HDO generously gave HBI another chance to cure its defects and HBI could not do that. But for this kindly treatment and an ambiguity in the rules, HDO at para. 9, HBI would never have been designated.

engineering study confirmed the pattern deficiency. See "Mass Media Bureau's Opposition to Petition for Leave to Amend," filed June 30, 1992, at 2. The September 1991 HBI amendment is annexed to Deas' July 22 Opposition to the "Corrected Amendment."

³ HBI relies mistakenly on the Policy Statement on FM Applications, 58 RR 2d 166, at 168 (1985). But see 169 (penultimate paragraph; emphasis added):

An application found to be sufficient for tender will be studied to determine its acceptability for filing, that is, to determine whether it is in compliance with applicable Commission rules If found to be unacceptable for filing, it will be returned. . . .

See also, Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications (NPRM), 7 FCC Rcd 7265 (1991), at para. 5: acceptability review "includes such critical factors as the application's compliance with international treaties and adherence to Commission rules involving power, height and spacing. If an application is found to be technically unacceptable, the staff will dismiss it as defective" (emphasis added; citation omitted.); modified, Commercial FM Applications), MM Docket No. 91-347 (July 16, 1992), 7 FCC Rcd ____.

See also, Rule 73.3566(a).

4. The straw man claim that it should not have been dismissed because compliance with Rule 73.316(b) is not a listed tenderability defect, is meritless. Section 73.3566(a), "Defective applications," says:

Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed.

HBI admits that it broke the rule (though insisting that this rule is not that important). No waiver was sought. Moreover, the "typographical error" was submitted twice, in September 1991 and June 1992, after an HDO admonition that the next filing must conform with all rules.

5. The claim that "good cause" was shown for acceptance of the "Corrected Amendment" is incredible. Despite its misplaced reliance on Magdalene Gunden Partnership, 2 FCC Rcd 5513 (Rev. Bd. 1987) (subsequent history omitted), HBI's July 16 Petition for Leave to File Corrected Amendment does not even mention foreseeability, on which Gunden turns.⁴

6. In Pueblo Radio, the Commission affirmed the Board's rejection of an amendment on foreseeability grounds and dismissed an application after designation for prior technical

⁴ Space limitations preclude extended discussion of Gunden. An on-target Commission distinction is made in Pueblo Radio Broadcasting Service, 5 FCC Rcd 6278, 6279 n. 3 (1990). Suffice it to say that Gunden and HBI have nothing in common; Pueblo Radio requires the affirmance of HBI's dismissal.

defects.⁵ Unlike HBI, the Pueblo applicant was dismissed without the benefit of an extra 30 days to fix its problems. Like HBI, it relied on Gunden and pinned the blame for its deficiencies on a technical consultant.

7. The Commission rejected these claims at 5 FCC Rcd 9279 para. 6, noting that the U.S./Mexico treaty (like the FM directional rules), is foreseeable.⁶ It also repudiated the applicant's attempt to blame FCC staff for not catching all engineering mistakes before designation.⁷ HBI's initial engineering submission and its September 1991 amendment were riddled with errors; the HDO was not required to list them all. The admonition that HBI must submit a perfect application within 30 days was as specific as it was fair. HBI did not do so and has only itself to blame for that. Pueblo Radio.⁸

⁵ The Pueblo Radio applicant violated the U.S./Mexico FM Agreement.

⁶ HBI does not pretend to have misunderstood Section 73.316, only that it didn't break the rule by very much and that its army of experts overlooked the violation despite its having appeared in two separate filings made ten months apart.

⁷ HBI's assertion that it was "diligent" because it filed its fourth engineering showing within 12 days of "notice" of its third violation, cannot be taken seriously. The Commission is not obliged to give applicants "notice" of technical defects.

⁸ See also SBM Communications, Inc., 7 FCC 2d 3436, 3437 paras. 9-10 (1992) (defective application subsequently dismissed after staff error in designating it); R. Donnie Goodale, 7 FCC Rcd 1495, 1497 paras. 8-9 (1992) (staff has discretion to dismiss application despite "readily correctible" coordinate disparity); Domega Broadcasting Corporation, 4 FCC Rcd 1450, 1451 para. 9 (1989) (applicant's lack of knowledge of rules and processing guidelines insufficient good cause to amend); Richard P. Bott, II, 3 FCC Rcd 6063, 6064 paras. 8-12 (1988) (coordinates inaccurate by only ten seconds warrant dismissal).

8. HBI's "Corrected Amendment" offends several "good cause" criteria: (a) the amendment was not necessitated by events HBI could not reasonably have foreseen; (b) it was not diligently filed; (c) it was the product of HBI's repeated voluntary acts; viz., defective September 1991 and June 1992 amendments; and (d), it disrupts the conduct of the hearing. Nagaubo Broadcasting Company, 6 FCC Rcd 912, 917 para. 21 (Rev. Bd. 1991) (postdesignation amendment fails to cure technical deficiency clearly articulated in HDO).⁹

9. In conclusion, HBI admits that its June amendment violated Section 73.316(b)(2). Its application is defective per Section 73.3566 and not acceptable for filing under the "hard look" doctrine. The ALJ was right to dismiss HBI and the Board should summarily affirm that ruling.

Respectfully submitted,

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September 1, 1992

⁹ Footnote 10 of the Appeal, analogizing HBI's plight to geographic coordinate discrepancies, is unhelpful to its cause. As the Commission recently held in American Indian Broadcast Group, Inc., FCC 92-390, released August 28, 1992, at para. 4, citing Nicholasville Broadcasting Corporation, 4 FCC Rcd 2574 (1989); and Richard P. Bott, II, it is well settled that such discrepancies render an application unacceptable for filing as patently not in accordance with FCC requirements. See also, R. Donnie Goodale.

CERTIFICATE OF SERVICE

I hereby certify that I have, this 1st day of September, 1992, served copies of the foregoing "Opposition to Appeal from Dismissal of Application" upon the following persons by first class United States Mail, postage prepaid:

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